

1 John A. Conkle (SB# 117849)
2 *j.conkle@conkletlaw.com*
3 Amanda R. Washton (SB# 227541)
4 *a.washton@conkletlaw.com*
5 CONKLE, KREMER & ENGEL
6 Professional Law Corporation
7 3130 Wilshire Boulevard, Suite 500
8 Santa Monica, California 90403-2351
9 Phone: (310) 998-9100 • Fax: (310) 998-9109

10 Michael M. Lafeber (*pro hac vice* pending)
11 *mlafeber@taftlaw.com*
12 O. Joseph Balthazor Jr. (*pro hac vice* pending)
13 *jbalthazor@taftlaw.com*

14 **TAFT STETTINIUS & HOLLISTER LLP**
15 2200 IDS Center
16 80 S. 8th St.
17 Minneapolis, MN 55402
18 Tel: 612.977.8400
19 Fax: 612.977.8650

20 Attorneys for Movant
21 Dexon Computer, Inc.

22

23

24 UNITED STATES DISTRICT COURT
25
26 NORTHERN DISTRICT OF CALIFORNIA
27

28 CISCO SYSTEMS, INC., and
1 CISCO TECHNOLOGY, INC.,

2 Plaintiff,

3 v.

4 DEXON COMPUTER, INC.,

5 Defendant.

6 Case No. 3:20-cv-4926

7 **SECOND DECLARATION OF
8 STEPHEN O'NEIL IN SUPPORT
9 OF DEFENDANT'S RENEWED
10 MOTION TO DISMISS**

11

12

13

14

15 0640.002\9989

16 Case No. 3:20-cv-4926

17 SECOND DECLARATION OF STEPHEN O'NEIL IN SUPPORT OF DEFENDANT'S RENEWED MOTION

18

1 I, Stephen O'Neil, declare as follows:

2 1. I am the President and Chief Executive Officer of Dexon Computer, Inc.
3 ("Dexon"). All the statements in my original Declaration dated September 25, 2020
4 (Doc. No. 10-1) remain truthful and accurate in all respects

5 2. As part of jurisdictional discovery, Cisco required Dexon to produce all
6 of its invoices covering sales to customers residing in California for the period "July
7 22, 2016 to the present."

8 3. It's my understanding that despite possessing invoices covering all such
9 California sales, as well as being allowed to subpoena Dexon's customers and conduct
10 inspections on the subject products, Cisco has been able to identify just 26 California
11 sales transactions involving 60 allegedly counterfeit products.

12 4. Such allegedly counterfeit 60 products accounted for \$72,855.00 in
13 revenue. That represents represent just .125% (or 1/8th of 1%) of Dexon's total
14 revenues of approximately \$58,000,000.00 for the corresponding time period.

15 5. It's my understanding Cisco has attempted to rely on an End User
16 License Agreement ("EULA") to establish personal jurisdiction over Dexon. Dexon
17 is not a party to any of the alleged Cisco EULAs. Attached hereto as **Exhibit A** is
18 what Dexon believes to be a true and correct copy of a 2019 version of Cisco's EULA.

19 I declare under penalty of perjury that to the best of my knowledge the
20 foregoing statements are true and correct.

22
23 Dated: April 19, 2021

/s/Stephen O'Neil
24 Stephen O'Neil

25
26
27
28

EXHIBIT A



Cisco End User License Agreement

This is an agreement between You and Cisco Systems, Inc. or its affiliates ("Cisco") and governs your Use of Cisco Software. "You" and "Your" means the individual or legal entity licensing the Software under this EULA. "Use" or "Using" means to download, install, activate, access or otherwise use the Software. "Software" means the Cisco computer programs and any Upgrades made available to You by an Approved Source and licensed to You by Cisco. "Documentation" is the Cisco user or technical manuals, training materials, specifications or other documentation applicable to the Software and made available to You by an Approved Source. "Approved Source" means (i) Cisco or (ii) the Cisco authorized reseller, distributor or systems integrator from whom you acquired the Software. "Entitlement" means the license detail; including license metric, duration, and quantity provided in a product ID (PID) published on Cisco's price list, claim certificate or right to use notification. "Upgrades" means all updates, upgrades, bug fixes, error corrections, enhancements and other modifications to the Software and backup copies thereof.

This agreement, any supplemental license terms and any specific product terms at www.cisco.com/go/softwareterms (collectively, the "EULA") govern Your Use of the Software.

1. **Acceptance of Terms.** By Using the Software, You agree to be bound by the terms of the EULA. If you are entering into this EULA on behalf of an entity, you represent that you have authority to bind that entity. If you do not have such authority or you do not agree to the terms of the EULA, neither you nor the entity may Use the Software and it may be returned to the Approved Source for a refund within thirty (30) days of the date you acquired the Software or Cisco product. Your right to return and refund applies only if you are the original end user licensee of the Software.
2. **License.** Subject to payment of the applicable fees and compliance with this EULA, Cisco grants You a limited, non-exclusive and non-transferable license to Use object code versions of the Software and the Documentation solely for Your internal operations and in accordance with the Entitlement and the Documentation. Cisco licenses You the right to Use only the Software You acquire from an Approved Source. Unless contrary to applicable law, You are not licensed to Use the Software on secondhand or refurbished Cisco equipment not authorized by Cisco, or on Cisco equipment not purchased through an Approved Source. In the event that Cisco requires You to register as an end user, Your license is valid only if the registration is complete and accurate. The Software may contain open source software, subject to separate license terms made available with the Cisco Software or Documentation.
If the Software is licensed for a specified term, Your license is valid solely for the applicable term in the Entitlement. Your right to Use the Software begins on the date the Software is made available for download or installation and continues until the end of the specified term, unless otherwise terminated in accordance with this Agreement.
3. **Evaluation License.** If You license the Software or receive Cisco product(s) for evaluation purposes or other limited, temporary use as authorized by Cisco ("Evaluation Product"), Your Use of the Evaluation Product is only permitted for the period limited by the license key or otherwise stated by Cisco in writing. If no evaluation period is identified by the license key or in writing, then the evaluation license is valid for thirty (30) days from the date the Software or Cisco product is made available to You. You will be invoiced for the list price of the Evaluation Product if You fail to return or stop Using it by the end of the evaluation period. The Evaluation Product is licensed "AS-IS" without support or warranty of any kind, expressed or implied. Cisco does not assume any liability arising from any use of the Evaluation Product. You may not publish any results of benchmark tests run on the Evaluation Product without first obtaining written approval from Cisco. You authorize Cisco to use any feedback or ideas You provide Cisco in connection with Your Use of the Evaluation Product.
4. **Ownership.** Cisco or its licensors retain ownership of all intellectual property rights in and to the Software, including copies, improvements, enhancements, derivative works and modifications thereof. Your rights to Use the Software are

limited to those expressly granted by this EULA. No other rights with respect to the Software or any related intellectual property rights are granted or implied.

5. Limitations and Restrictions. You will not and will not allow a third party to:

- a. transfer, sublicense, or assign Your rights under this license to any other person or entity (except as expressly provided in Section 12 below), unless expressly authorized by Cisco in writing;
- b. modify, adapt or create derivative works of the Software or Documentation;
- c. reverse engineer, decompile, decrypt, disassemble or otherwise attempt to derive the source code for the Software, except as provided in Section 16 below;
- d. make the functionality of the Software available to third parties, whether as an application service provider, or on a rental, service bureau, cloud service, hosted service, or other similar basis unless expressly authorized by Cisco in writing;
- e. Use Software that is licensed for a specific device, whether physical or virtual, on another device, unless expressly authorized by Cisco in writing; or
- f. remove, modify, or conceal any product identification, copyright, proprietary, intellectual property notices or other marks on or within the Software;

6. Third Party Use of Software. You may permit a third party to Use the Software licensed to You under this EULA if such Use is solely (i) on Your behalf, (ii) for Your internal operations, and (iii) in compliance with this EULA. You agree that you are liable for any breach of this EULA by that third party.

7. Limited Warranty and Disclaimer.

- a. **Limited Warranty.** Cisco warrants that the Software will substantially conform to the applicable Documentation for the longer of (i) ninety (90) days following the date the Software is made available to You for your Use or (ii) as otherwise set forth at <http://www.cisco.com/go/warranty>. This warranty does not apply if the Software, Cisco product or any other equipment upon which the Software is authorized to be used: (i) has been altered, except by Cisco or its authorized representative, (ii) has not been installed, operated, repaired, or maintained in accordance with instructions supplied by Cisco, (iii) has been subjected to abnormal physical or electrical stress, abnormal environmental conditions, misuse, negligence, or accident; (iv) is licensed for beta, evaluation, testing or demonstration purposes or other circumstances for which the Approved Source does not receive a payment of a purchase price or license fee; or (v) has not been provided by an Approved Source. Cisco will use commercially reasonable efforts to deliver to You Software free from any viruses, programs, or programming devices designed to modify, delete, damage or disable the Software or Your data.

- b. **Exclusive Remedy.** At Cisco's option and expense, Cisco shall repair, replace, or cause the refund of the license fees paid for the non-conforming Software. This remedy is conditioned on You reporting the non-conformance in writing to Your Approved Source within the warranty period. The Approved Source may ask You to return the Software, the Cisco product, and/or Documentation as a condition of this remedy. This Section is Your exclusive remedy under the warranty.

c. Disclaimer.

Except as expressly set forth above, Cisco and its licensors provide Software "as is" and expressly disclaim all warranties, conditions or other terms, whether express, implied or statutory, including without limitation, warranties, conditions or other terms regarding merchantability, fitness for a particular purpose, design, condition, capacity, performance, title, and non-infringement. Cisco does not warrant that the Software will operate uninterrupted or error-free or that all errors will be corrected. In addition, Cisco does not warrant that the Software or any equipment, system or network on which the Software is used will be free of vulnerability to intrusion or

- attack.
8. **Limitations and Exclusions of Liability.** In no event will Cisco or its licensors be liable for the following, regardless of the theory of liability or whether arising out of the use or inability to use the Software or otherwise, even if a party been advised of the possibility of such damages: (a) indirect, incidental, exemplary, special or consequential damages; (b) loss or corruption of data or interrupted or loss of business; or (c) loss of revenue, profits, goodwill or anticipated sales or savings. All liability of Cisco, its affiliates, officers, directors, employees, agents, suppliers and licensors collectively, to You, whether based in warranty, contract, tort (including negligence), or otherwise, shall not exceed the license fees paid by You to any Approved Source for the Software that gave rise to the claim. This limitation of liability for Software is cumulative and not per incident. Nothing in this Agreement limits or excludes any liability that cannot be limited or excluded under applicable law.
 9. **Upgrades and Additional Copies of Software.** Notwithstanding any other provision of this EULA, You are not permitted to Use Upgrades unless You, at the time of acquiring such Upgrade:
 - a. already hold a valid license to the original version of the Software, are in compliance with such license, and have paid the applicable fee for the Upgrade; and
 - b. limit Your Use of Upgrades or copies to Use on devices You own or lease; and
 - c. unless otherwise provided in the Documentation, make and Use additional copies *solely* for backup purposes, where backup is limited to archiving for restoration purposes.
 10. **Audit.** During the license term for the Software and for a period of three (3) years after its expiration or termination, You will take reasonable steps to maintain complete and accurate records of Your use of the Software sufficient to verify compliance with this EULA. No more than once per twelve (12) month period, You will allow Cisco and its auditors the right to examine such records and any applicable books, systems (including Cisco product(s) or other equipment), and accounts, upon reasonable advanced notice, during Your normal business hours.. If the audit discloses underpayment of license fees, You will pay such license fees plus the reasonable cost of the audit within thirty (30) days of receipt of written notice.
 11. **Term and Termination.** This EULA shall remain effective until terminated or until the expiration of the applicable license or subscription term. You may terminate the EULA at any time by ceasing use of or destroying all copies of Software. This EULA will immediately terminate if You breach its terms, or if You fail to pay any portion of the applicable license fees and You fail to cure that payment breach within thirty (30) days of notice. Upon termination of this EULA, You shall destroy all copies of Software in Your possession or control.
 12. **Transferability.** You may only transfer or assign these license rights to another person or entity in compliance with the current [Cisco Relicensing/Transfer Policy](#). Any attempted transfer or, assignment not in compliance with the foregoing shall be void and of no effect.
 13. **US Government End Users.** The Software and Documentation are "commercial items," as defined at Federal Acquisition Regulation ("FAR") (48 C.F.R.) 2.101, consisting of "commercial computer software" and "commercial computer software documentation" as such terms are used in FAR 12.212. Consistent with FAR 12.211 (Technical Data) and FAR 12.212 (Computer Software) and Defense Federal Acquisition Regulation Supplement ("DFAR") 227.7202-1 through 227.7202-4, and notwithstanding any other FAR or other contractual clause to the contrary in any agreement into which this EULA may be incorporated, Government end users will acquire the Software and Documentation with only those rights set forth in this EULA. Any license provisions that are inconsistent with federal procurement regulations are not enforceable against the U.S. Government.
 14. **Export.** Cisco Software, products, technology and services are subject to local and extraterritorial export control laws and regulations. You and Cisco each will comply with such laws and regulations governing use, export, re-export, and

transfer of Software, products and technology and will obtain all required local and extraterritorial authorizations, permits or licenses. Specific export information may be found at: <http://tools.cisco.com/legal/export/pepd/Search.do>

15. **Survival.** Sections 4, 5, the warranty limitation in 7(a), 7(b) 7(c), 8, 10, 11, 13, 14, 15, 17 and 18 shall survive termination or expiration of this EULA.
16. **Interoperability.** To the extent required by applicable law, Cisco shall provide You with the interface information needed to achieve interoperability between the Software and another independently created program. Cisco will provide this interface information at Your written request after you pay Cisco's licensing fees (if any). You will keep this information in strict confidence and strictly follow any applicable terms and conditions upon which Cisco makes such information available.

17. Governing Law, Jurisdiction and Venue.

If You acquired the Software in a country or territory listed below, as determined by reference to the address on the purchase order the Approved Source accepted or, in the case of an Evaluation Product, the address where Product is shipped, this table identifies the law that governs the EULA (notwithstanding any conflict of laws provision) and the specific courts or arbitrators that have exclusive jurisdiction over any claim arising under this EULA.

Country or Territory	Governing Law	Jurisdiction and Venue
United States, Latin America or the Caribbean	State of California, United States of America	Federal District Court, Northern District of California or Superior Court of Santa Clara County, California
Canada	Province of Ontario, Canada	Courts of the Province of Ontario, Canada
Europe (excluding Italy), Middle East, Africa, Asia (excluding Japan and China) or Oceania (excluding Australia)	Laws of England	English Courts
Japan	Laws of Japan	Tokyo District Court of Japan
Australia	Laws of the State of New South Wales	State and Federal Courts of New South Wales
Italy	Laws of Italy	Court of Milan
China	Laws of the People's Republic of China.	Hong Kong International Arbitration Center
All other countries or territories	State of California	State and Federal Courts of California

The parties specifically disclaim the application of the UN Convention on Contracts for the International Sale of Goods. In addition, no person who is not a party to the EULA shall be entitled to enforce or take the benefit of any of its terms under the Contracts (Rights of Third Parties) Act 1999. Regardless of the above governing law, either party may seek interim injunctive relief in any court of appropriate jurisdiction with respect to any alleged breach of such party's intellectual property or proprietary rights.

18. Integration. If any portion of this EULA is found to be void or unenforceable, the remaining provisions of the EULA shall remain in full force and effect. Except as expressly stated or as expressly amended in a signed agreement, the EULA constitutes the entire agreement between the parties with respect to the license of the Software and supersedes any conflicting or additional terms contained in any purchase order or elsewhere, all of which terms are excluded. The parties agree that the English version of the EULA will govern in the event of a conflict between it and any version translated into another language.

Cisco and the Cisco logo are trademarks or registered trademarks of Cisco and/or its affiliates in the U.S. and other countries. To view a list of Cisco trademarks, go to this URL: www.cisco.com/go/trademarks. Third-party trademarks mentioned are the property of their respective owners. The use of the word partner does not imply a partnership relationship between Cisco and any other company. (1110R)